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**CITY OF SHORELINE
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

APPELLANT: Bruce and Mary Vincent

APPLICANT: Bruce and Mary Vincent

FILE NUMBER: #1999-0550 and Short Plat #SHSP 99-004

APPEALS: Appeal Of City Of Shoreline Denial Of Short Plat Application

REVIEW PROCESS: The Hearing Examiner holds an open record hearing on the appeal and makes a decision.

I. BACKGROUND INFORMATION SUMMARY:

A. PROJECT DESCRIPTION:

The application proposes to divide one lot to create an additional lot and an access tract. The property is currently accessed from a narrow drive off of 175th St. that also serves a neighboring residence. The site contains four wetlands, two of which are proposed to be filled. Proposed mitigation measures include 1:1 replacement of one of the wetlands, enhancement of functional values through enhancement of existing wetlands and design of a stormwater system, and the placement of wetlands into a Sensitive Areas Tract.

B. PROCEDURAL HISTORY:

The following is a brief summary of the history of this project.

- March 30, 1999 Vincent submitted an application for a short plat to divide one lot into two parcels.
- April 30, 1999 City determined the application to be complete under S.M.C. Title 16 and 18.
- May 12 through June 11, 1999. Comment period on the application. Three comment letters noted that there might be wetlands on the site (See Hearing Examiner Exhibit E, Exhibit B).
- June 15, 1999 City Staff conducted site visit.
- June 18, 1999 City sent letter to the applicant requesting a report prepared by a qualified wetlands biologist to locate the edges of the wetlands and the associated buffers (Hearing Examiner Exhibit E, Exhibit C).
- Undetermined Date Applicant requested clarification by telephone.

- November 22, 1999, City responded by letter on specific details about what was required to continue review of this project (Hearing Examiner Exhibit E, Exhibit D). The deadline for submitting this information was extended, but not identified.
- April 7, 2000 Applicant submitted a package containing a wetlands delineation identifying four wetlands on the project site (Hearing Examiner Exhibit E, Exhibit E). The report did not disclose the size of the off-site area of one of the wetlands (Wetland C). No buffer was indicated on Lot 2.
- April 21, 2000 City informed the applicant by letter that additional information was needed to proceed with the short plat review (Hearing Examiner Exhibit A, Exhibit F).
- June 6, 2000 Applicant submitted a wetlands mitigation plan and SEPA checklist (Hearing Examiner Exhibit E, Exhibit G). This submittal still showed the building footprint of Lot 2 as violating the wetland buffer area.
- July 17, 2000 City of Shoreline issued a decision to deny the short plat (Hearing Examiner Exhibit E, Exhibit A, Attachment A-1).
- July 28, 2000 Applicant appealed the decision (see Appeal letter, Hearing Examiner Exhibit E, Exhibit H).
- No Date Indicated After considering the appeal, the City rescinded the denial in order to provide the Applicant opportunity to address the issues leading to the denial and submit a revision to the application that would meet the code. Letter from Courtney A. Kaylor representing Vincents dated August 9, 2000 confirms the agreement to withdraw the decision and to continue to process the short plat application.
- October 27, 2000 Applicant submitted a revision to the application, (Hearing Examiner Exhibit E, Exhibit I). In their letter the applicant noted that they would appreciate the opportunity to address any adverse comments before a decision is issued.
- November 21, 2000 City issued a decision to deny the revised proposal, based on the finding that is still did not meet either S.M.C. Title 18 or Title 20 (Hearing Examiner Exhibit E, Exhibit A, Attachment A-2).
- December 4, 2000 Applicant by a letter dated December 1, 2000 appealed the City decision to deny the application.

C. ISSUES OF THE APPEAL

The Appellant identifies three issues in their appeal of the denial of their application for a short plat:

1. The City's denial was based on the erroneous conclusion that the application could not meet applicable wetland buffer requirements.
2. The City improperly failed to provide the Vincents with an opportunity to show how their application could meet these requirements; and
3. The City incorrectly concluded that the Comprehensive Plan does not support subdivisions in sensitive areas.

D. SUMMARY OF APPLICABLE CODES AND REGULATIONS

Applicable Codes in effect at the time of Vincent's application:

- Upon incorporation, Shoreline adopted Title 19 of the King County Code (KCC) to serve as an interim subdivision ordinance. Chapter 17.05 SMC.

- The City also adopted KCC Chapter 20.44 to serve as the City's SEPA (State Environmental Policy Act) Procedures. Chapter 14.05 of the Shoreline Municipal Code (SMC) .
- Chapter 18.12 SMC contains regulations for density and dimensional standards for lots.
- Chapter 18.24 SMC contains regulations regarding Environmentally Sensitive Areas.
- Chapter 16.40 SMC contains regulations regarding the procedures for processing land use applications.

Title 20, Shoreline's new development code, was adopted this year in two phases. Ordinance 230, adopted March 7, 2000, repealed Title 16 and 17 of the interim code. Ordinance 238 adopted June 12, 2000, repealed Title 18 of the code.

- Chapter 20.50 S.M.C. governs general development standards
- Chapter 20.80 S.M.C. governs development in environmentally critical areas

The Vincents submitted a complete application for their short plat prior to the effective date of Title 20. Noticing and procedural requirements have been carried out under Title 16 of the interim code. The revised project has been reviewed under the development standards for special districts (environmentally sensitive areas) of both Title 18 of the interim code and Title 20 of the new development code. The relevant codes and ordinances are attached as Hearing Examiner Exhibit E, Exhibit J.

State Environmental Policy Act (SEPA) Requirements

At the time the project application was submitted, Shoreline had adopted King County Chapter 20.44 as its environmental regulations under SEPA (S.M.C. 14.05, Hearing Examiner Exhibit E, Exhibit J-2). The project is not categorically exempt from threshold determination requirements (WAC 197-11-800), because it would be altering the condition of an environmentally sensitive area (S.M.C. 16.40.050). No threshold determination was made due to the City's action denying the project.

II. PUBLIC HEARING

On January 24, 2001, the Hearing Examiner held a public hearing on the appeal. The hearing was opened at 7:00 p.m. in the Mount Rainier Room of the Shoreline Conference Center and was closed at 8:45 p.m.

At the beginning of the public hearing the Hearing Examiner indicated that he viewed the site and had reviewed the record and briefs submitted to date. He indicated the procedures for the hearing and noted that the burden of proof is on the appellant. Each witness was asked to affirm that the information they would provide was accurate and true.

Testimony was offered by the City of Shoreline and the Appellant / Applicant. Testimony was offered by the following:

City of Shoreline:

Kim Lehmberg, Planner I

Ian R. Sievers, City Attorney

Appellant / Applicant

Courtney A. Kaylor, Attorney for Vincent
Bruce Vincent, Owner / Applicant
William E. Shiels, Principal, Talasaea Consultants

The City of Shoreline provided background information on the project (Hearing Examiner Exhibit F).

The Appellant then presented their arguments on the issues of the appeal:

Ms. Kaylor reviewed the key issues of the appeal emphasizing that they would present information showing that they could meet the buffer and dimensional criteria of the City's ordinance, that the applicant had not generated major changes in the application resulting in material errors and that the subdivision process is a "give and take" between the applicant and the City.

Mr. Shiels discussed the issues of wetlands and buffer requirements on the site and submitted Hearing Examiner Exhibits G and H to illustrate how a portion of the adjacent lot, also owned by the applicant, could be used to mitigate the on-site wetlands and provide buffers meeting City requirements. He presented three options. He also indicated that they could not obtain permission from the owners of the property adjacent to Wetland C to delineate the size of that wetland on their property. It was recognized that if one of the newly presented options were acceptable to the City that they would have to submit additional analysis and detailed plans for review and approval.

Mr. Vincent reviewed the general chronology of the application and their efforts to comply with the City regulations.

Ian Sievers, Shoreline City Attorney, asked Mr. Shiels why they had not delineated all of Wetland C. Ms. Kaylor objected on the basis that this was not an issue of the appeal. The Hearing Examiner recognized her objection and allowed the question and the response. Mr. Shiels indicated that they were denied permission to enter the property; however it would not impact any other on-site wetland since it was lower in height and not in proximity to the development. In response to a question as to whether if they resubmitted he felt they could proceed with one of the options Mr. Shiels indicated that they would need to do additional analysis; however he was confident that it would work and meet required buffer requirements.

Ms. Lehmberg reviewed the issues related to the City's denial such as the provision of a separate tract for the critical areas, the lack of definition of Wetland C off-site, and the size of the lots, the dimension of the lots and the lack of adequate buffers. The City submitted selected pages of King County Code Title 19 (Hearing Examiner Exhibit I) for reference.

Ms. Kaylor asked Mr. Shiels if he felt the off-site options presented were feasible to which he answered in the affirmative. He noted that there were surprisingly few wetlands on that portion of the adjacent property and that it would be an appropriate place for mitigation. She asked if he could delineate property next to Wetland C without the property owner's permission to which he answered that they could not.

In questions to Ms. Lehmberg about the options being presented she indicated that they had not evaluated those and that the denial was based on the application information that had been

submitted and comprehensive plan policies. Ian Sievers noted that the City felt it had provided ample time allowing a second opportunity to make revisions and that the lack of information such as not delineating Wetland C and changes made to the application constituted material errors by the applicant such that the application should be denied. He noted that the applicant could reapply under the new code; however, it was recognized that there were some procedural issues. It was also noted that there were other non-conventional housing options available without a short plat being required.

Ms Kaylor questioned Ms Lehmborg and conformed that:

- The application had been accepted as complete on April 30, 1999;
- When additional information was requested the City did not specifically ask for information on Wetland C;
- Exhibit G, Option 3 appeared to be able to meet the 25 foot buffer requirement; and
- City could have requested additional information rather than deny the application.

In summation Ms. Kaylor emphasized:

- They have demonstrated that the applicant can provide a 25 foot buffer where City's decision (page 7) states that they can not;
- City could have asked for more information rather than denied it and the KCC 19.26.120 requires the City to ask for additional information;
- That there were no material errors in the application since there was no increase in the number of lots or loss of open space as noted in the definition;
- Applicant has a right to proceed in that the application was deemed to be complete by the City; and,
- The Applicant can meet all conditions and requirements of the City and recognize that it will require additional analysis and submission of detailed plans.

Ian Sievers for the City responded:

- The revised application as submitted still did not meet the requirements and that it is not the City's responsibility to redesign a project; and,
- That because of material error, lack of required information and substantial change that would be necessary a new application is required.

III. ANALYSIS OF APPEAL ISSUES

The Appellant has the burden of establishing that the decision of the City is not supported by the preponderance of evidence. Rules of Procedure Before the Hearing Examiner (RP), Resolution 130, Ex. A, Rule 9.8.

ISSUE 1: The City's denial was based on the erroneous conclusion that the application could not meet applicable wetland buffer requirements.

The appellants contend the Director incorrectly concluded that the project application could not meet the minimum lot size and width standards contained in the development code if applicable buffer requirements are also satisfied. They provided at the appeal hearing alternatives to the previously submitted design of the project that supposedly meet adequate buffer size, lot width

and lot size of the project and include a larger amount of off-site wetland mitigation on property also owned by the Vincents.

The City argued the Director made the correct decision based upon the content of the submitted application materials, the supplemental information requested and provided and subsequent revisions made after the first denial. They contend the project as proposed and revised still does not meet the standards of the S.M.C. (see Hearing Examiner Exhibit E, Exhibit A, Attachment A-2).

The City also contends that the required modifications are substantial changes that should be treated as a new application for purposes of vesting. They note that the application is flawed with a material error under KCC 19.26.050 that must be deemed withdrawn and subsequent re-submittals treated as new applications. Material error includes omission of substantive information (configuration of sensitive area tract) in the application or supplementary studies (wetland mitigation plan for new configuration) supplied to the city that would constitute the basis for a decision. KCC 19.04.470.

The City indicates that a second basis for denial is the City's policy in limiting rights vested in the initial complete application. Continuing the life of nonconforming permit applications where they have not been made complete or compliant with code after reasonable opportunity is contrary to the public interest and is properly limited by the City's ordinances. The City's ordinance on proposal modification and material error polices this balance where new codes have brought procedural and substantive changes to the approval process. The appellant objected to this being part of the argument since it was not raised as an appeal issue. The Hearing Examiner noted the objection and allowed the testimony.

ISSUE 2: The City improperly failed to provide the Vincents with an opportunity to show how their application could meet these requirements; and

The appellants contend that the Director improperly declined to provide the Vincents with the opportunity to respond to the Director's concerns regarding the size of the wetland buffer, thereby failing to follow applicable procedures, naming S.M.C. 16.40, S.M.C. 14.05 and the State Environmental Policy Act (SEPA). They submit that the Director failed to provide the Vincents with an opportunity to explain how the City's concerns could easily be addressed, which resulted in an inappropriate project denial that will cause the Vincents to incur significant additional costs.

The appellant argues that the Washington Supreme Court notes that the subdivision review process involves communication between agency staff and applicants. They cite the *Friends of the Law v. King County*, 123 Wn.2d 518, 528-529, 869 P.2d 1056 (1994), as follows:

It is to be expected that modifications will be made during the give and take of the approval process. Although it is up to local governments to decide what level of specificity they will require from a developer in its initial application (citations omitted), they may not cause the vesting of the application to be contingent on future events or decisions, nor make the application process so odious that completion is nearly impossible (Citations omitted). Once a completed application has been submitted, it is to be judged under the laws in effect at the

time of the submission. If the applicant can show that the plat, with the proper conditions and modifications will comply with those laws, it will be approved. If not, it will be rejected and the process may begin again.

The City contends it provided ample time, information and opportunity for the applicant to submit revisions to the project that would meet the S.M.C. under either the old or the new code. They note that additional information was requested during the initial review process and that they withdrew their first denial to allow additional time to submit revisions; however, they have concluded that this project as revised and submitted by the applicant does not meet the provisions of either Title 18 of the former zoning code or Title 20 of the new development code. Since Vincent agreed, following the first denial, to pay hourly fees for continued City review of the present application, there is not a significant cost difference in having the anticipated review of a new proposal covered under the flat fee applied to new short subdivision applications.

ISSUE 3: The City incorrectly concluded that the Comprehensive Plan does not support subdivisions in sensitive areas.

The appellants contend that the Director improperly based denial on the conclusion that the Shoreline Comprehensive Plan policies do not support the subdivision of property in sensitive areas. They propose that the project is consistent with the Shoreline Comprehensive Plan and Growth Management Act policies that support residential development that is located in an urban area and fully mitigates impacts to critical areas.

The City contends that Comprehensive Plan policies do support the conclusion of the Director and that they are reflected in the regulations contained in the development code. They specifically note that Policy EN 48: Preserve and maintain wetlands in a natural state. Alterations to wetlands may be considered only if they: are necessary to provide a reasonable economic use of a property, provided all wetland functions are evaluated, impact to the wetland is minimized to the maximum extent practicable, and affected significant functions are appropriately mitigated;

The City also notes that the appellants have not provided information on the total size of Wetland C, nor have they provided complete information concerning adjacent off-site conditions or possible off-site wetland functions. Further, as stated on page 4 of the Decision, the denial does not deprive the property owner reasonable economic use of the property. Reasonable economic use may be achieved through non-conventional land use design (such as a two-unit zero lot line development) or a single-family home or duplex, which are allowed under S.M.C. Title 20.

IV. FINDINGS / CONCLUSIONS:

A. FINDINGS

1. The initial application was submitted on March 30, 1999 and deemed complete on April 30, 1999.

2. The City requested additional information in the review of the initial application in June 1999, November 1999, and in April 2000.
3. The variance for the width of the access tract is not an issue in this appeal.
4. The City of Shoreline denied the project on July 17, 2000 but withdrew its initial denial to allow the applicant to make modifications to their application to respond to the issues of the denial.
5. The applicant submitted the revised application on October 27, 2000.
5. Although the applicants requested that the City confer with them prior to any decision, the City did not have any discussion prior to issuing the second denial on November 21, 2000.
6. The applicant did not present to the City for review as part of its application the range of off-site wetland / buffer alternatives that were presented to the Hearing Examiner at the Appeal Hearing.
7. The inability of the applicant to delineate Wetland C off their property is not considered to be a material error or omission of substantive information because of the location of that wetland to other wetlands and it being isolated from the proposed development.

B. CONCLUSIONS

1. The Director did not make an erroneous conclusion that the application could not meet applicable wetland buffer requirements based on the revised application materials submitted for review.
2. Although the applicant submitted alternatives at the appeal hearing that were identified as being able to meet the applicable wetland buffer requirements they have not been analyzed for wetlands on the adjacent property or for compliance with applicable regulations.
3. The City of Shoreline provided the Vincents with adequate opportunity to revise their application to meet City requirements.
4. The cited reference to *Friends v. King County* supports the appellant's contention that there is "give and take" during the approval process and that if the applicant shows the plat with proper conditions and modifications will comply that it will be approved. However, in this case the revised application still did not comply and as stated in the last sentence: "If not, it will be rejected and the process may begin again."
5. The goals and policies of the Comprehensive Plan must be balanced and are not inconsistent in supporting infill within existing neighborhoods while encouraging the preservation and maintenance of wetlands in a natural state.

V. DECISION:

The Appeal of the City of Shoreline denial of Short Plat SHSP 99-004 by Bruce and Mary Vincent is denied.

It is further noted that there is nothing in this denial to prohibit the Vincents from exploring other development options available under the Shoreline Municipal Code or requesting a pre-application meeting for a new short plat application that does comply to the standards of the current Shoreline Municipal Code.

EXHIBIT LIST

- Exhibit A** **Appeal of Amended Notice of Decision, Amended Findings and Decision of Short Plat Application Number 1999-00550, SHSP 99004**
Dated December 1, 2000
Submitted by Courtney Kaylor, applicant/appellants' representative
Received in City Clerk's Office December 4, 2000
- Exhibit B** **Photocopy of project file**
Not dated
Submitted by Kim Lehmberg, Planner I
Received in City Clerk's Office December 11, 2000
- Exhibit C** **Letter to Shoreline Hearing Examiner from Courtney Kaylor, applicant/appellants' representative**
Dated January 10, 2001
Received in City Clerk's Office via facsimile January 10, 2001
- Exhibit D** **"Vincents' Prehearing Brief"**
Dated January 17, 2001
Submitted by Courtney Kaylor, applicant/appellants' representative
Received in City Clerk's Office via facsimile January 17, 2001
- Exhibit E** **"Hearing Memorandum of City of Shoreline" with Exhibits A through J**
Dated January 17, 2001
Submitted by Kim Lehmberg, Planner I
Received in City Clerk's Office January 17, 2001

Received at Appeal Hearing:

- Exhibit F** **29-page black-and-white printout of computer slide presentation displayed during hearing**
Dated January 24, 2001
Submitted by Kim Lehmberg, Planner I
- Exhibit G** **Three black-and-white pages: "Mitigation Plan, option #1," "Mitigation Plan, option #2," and "Mitigation Plan, option #3"**

Dated January 24, 2001

Submitted by Courtney Kaylor, applicant/appellants' representative

Exhibit H Black-and-white illustration, "Conceptual Wetland Mitigation Plan"
(Attachment I-3 to Exhibit E, "Hearing Memorandum of City of Shoreline")

Dated October 26, 2000

Submitted by Courtney Kaylor, applicant/appellants' representative

Exhibit I Photocopied excerpts from K.C.C. Title 19, pages 9, 10, 23 and 24

Not dated

Submitted by Ian Sievers, City Attorney

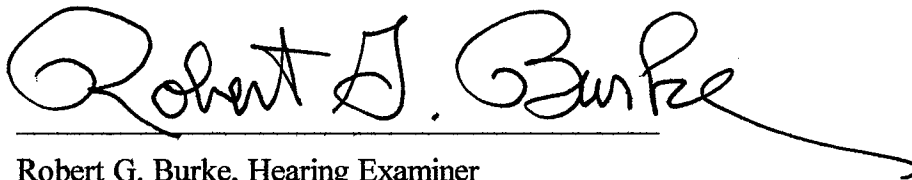
PARTIES OF RECORD

Bruce and Mary Vincent, 17514 1st Avenue NW, Shoreline, WA 98177

Courtney A. Kaylor, Phillips, McCullough, Wilson, Hill & Fikso, 2025 1st Avenue, Suite 1130,
Seattle, WA 98121

City of Shoreline, 17544 Midvale Avenue North, Shoreline, WA 98133-4921

Entered this 7th Day of February, 2001. The decision of the Hearing Examiner shall be the final decision on any Appeal.

A handwritten signature in black ink that reads "Robert G. Burke". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Robert G. Burke, Hearing Examiner

APPEAL OF HEARING EXAMINER DECISION:

Pursuant to Ch. 347 of 1995, Sec 705, this decision may be appealed by filing a land use petition in Superior Court and serving all persons entitled to service under 705 within 21 calendar days of the date the decision was mailed to the parties of record. At the end of the 21-day period, if no appeal has been filed, the decision of the Hearing Examiner shall become final and any appeal is thereafter barred. The last day for filing an appeal is February 28, 2001. The appeal must be filed with King County Superior Court, King County Clerk's Office, Room E-609, King County Courthouse, 516 Third Avenue, Seattle, Washington.